

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





ORIGINAL

77-7047

To be argued by  
PAUL G. WHITBY

United States Court of Appeals  
FOR THE SECOND CIRCUIT

PATRICIA A. FAHEY,

*Plaintiff-Appellant,*

*against*

SHIRLEY E. FAHEY and NORMAN CODO,

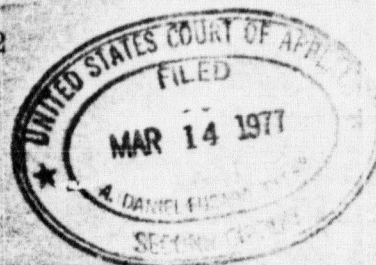
*Defendants-Appellees.*

ON APPEAL FROM THE MEMORANDUM AND ORDER OF  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANTS-APPELLEES**

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### ISSUES PRESENTED FOR REVIEW

1. Is the memorandum and order entered by the District Court a judgment from which an appeal lies?
2. Did the District Court commit error in denying plaintiff-appellant's motion to reargue her motion to set aside the dismissal of her complaint and to grant leave for discovery?

Defendants-appellees contend that the memorandum and order appealed from is not an appealable order and the District Court committed no error in refusing to allow plaintiff to reargue her motion to set aside the dismissal of her complaint and to grant leave for discovery.

### STATEMENT OF THE CASE

Plaintiff moved before the District Court for an order pursuant to Rule 60(b)(1) to set aside the earlier dismissal of her complaint on the grounds that as a result of her "mistake, inadvertence, surprise or excusable neglect" she failed to assert an additional basis for personal jurisdiction over the defendants under §302 of the New York Civil Practice Law and Rules, the New York long-arm statute. Her asserted purpose in seeking to set aside the judgment

was to obtain discovery of the defendants pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure as to the merits of her cause of action.

By memorandum and order dated December 13, 1976, the Honorable Richard Owen, Judge of the United States District Court for the Southern District of New York, denied plaintiff's motion. The Honorable Judge Owen found plaintiff had not demonstrated that her cause of action arose from real property located within the State of New York as required by CPLR §302(a)(4). Thereafter, by memorandum and order dated January 3, 1977, the Honorable Richard Owen denied plaintiff's motion for reargument of his decision dated December 13, 1976. Plaintiff appeals from that latest determination.

#### PRIOR PROCEEDINGS

Plaintiff Patricia A. Fahey, attorney pro se, commenced an action against the defendants to recover compensatory damages alleged to have arisen as a result of a violation by the defendants of her right to receive income under the Last Will and Testament of her father of which the defendants are executors. Plaintiff alleges that the failure of the defendants to make those payments to which



she claims she is entitled is a violation of her civil rights under the United States Constitution and applicable federal law. By memorandum and order dated December 11, 1975, the Honorable Richard Owen dismissed plaintiff's complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for the reason that the District Court lacked personal jurisdiction over the defendants. Judgment was entered accordingly.

Plaintiff appealed to this Court from the judgment of the District Court and on May 10, 1976 this Court unanimously affirmed the judgment dismissing plaintiff's complaint. Plaintiff thereupon moved before this Court for a rehearing and for a stay of the order dismissing her complaint. On the 7th day of June, 1976, this Court unanimously denied her motion. Thereafter, plaintiff moved for reconsideration of her motion for an order staying the dismissal of her action pending an application to the Supreme Court for certiorari. On the 18th day of June, 1976, this Court unanimously denied her motion for reargument and observed

"We note that the same relief has  
already been sought before."

In October, 1976, plaintiff commenced her proceeding before the District Court pursuant to Rule 60(b)(1) for an order setting aside the judgment of the District Court

which had dismissed her complaint and for leave to seek discovery of the defendants pursuant to Rule 34 of the Federal Rules of Civil Procedure. Her motion was denied as was the motion to reargue. No appeal has been taken by plaintiff from the decision of the District Court denying her motion under Rule 60(b)(1) and her time to do so has elapsed. It is from the denial of her motion for reargument that plaintiff currently appeals.

#### ARGUMENT

POINT I: THE MEMORANDUM AND ORDER  
FROM WHICH PLAINTIFF APPEALS  
IS NOT A FINAL DECISION FROM  
WHICH AN APPEAL LIES

28 U.S.C. §1291 provides in part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . ."

Plaintiff is appealing from a denial of a motion for reargument. Such a determination is not a "final decision" within the meaning of 28 U.S.C. §1291. See Klein's Outlet, Inc. v. Lipton, 181 F.2d 713 (2d Cir. 1950) cert. denied 340 U.S. 833, 71 S.Ct. 59, 95 L.Ed. 612 (1950) where this Court dismissed an appeal stating:



"[T]he appeal must be taken from the original order . . . not from the order denying the motion for reargument, since the refusal to entertain a motion for reargument, or denial of the motion, if entertained, is not the subject of an appeal."

The Court continued:

"'A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for an appeal.' Wayne United Gas Co. v. Owens Co., 300 U.S. 131, 137, 57 S.Ct. 382, 385, 81 L.Ed. 557. (italics added). Were this not so, a dissatisfied litigant could indefinitely extend his time for appeal by the simple expedience of filing successive motions for rehearing." 181 F.2d at 714.

See also Hines v. Seaboard Air Line Railroad Company, 341 F.2d 229 (2d Cir. 1965), involving a Rule 60(b) motion and a denial of a motion to reargue thereon; and Hawkins v. Lindsley, 327 F.2d 356 (2d Cir. 1964), also arising under Rule 60(b), where this Court refused to entertain that portion of an appeal from a denial of a motion for reargument stating:

"As to plaintiff's appeal from denial of his motion for reargument, it will suffice to note that an order denying reargument is not appealable." (citing cases) 327 F.2d at 357.

Plaintiff's appeal should be dismissed since no appeal lies from the denial of her motion to reargue. Further, no timely appeal has been filed from the denial of her Rule 60(b) motion and therefore no appeal lies from that decision.

See Spampinato v. M. Breger & Co., 270 F.2d 46 (2d Cir. 1959) cert. denied, 361 U.S. 944, 80 S.Ct. 409, 4 L.Ed.2d 363 (1960), rehearing denied, 361 U.S. 974, 80 S.Ct. 597, 4 L.Ed.2d 553 (1960), whose similarities to the instant case are startling. In that case, the plaintiff, appearing pro se, sought relief against the defendants claiming a violation of his civil rights. The lower court denied reargument upon a motion which had dismissed the plaintiff's amended complaint and supplemental amended complaint. This Court in denying the motion held:

"The claim of error in denying reargument needs no discussion. A motion for reargument is discretionary and denial of it is not appealable." 270 F.2d at 48.

This Court's additional observation at 270 F.2d 49, Note 3, is equally applicable here.

"This long-drawn out case is a striking demonstration of the accuracy of Judge Parkinson's comment in Davis v. Foreman, 7 Cir., 251 F.2d 421, 422, as to the harassment caused to the courts and the parties when a layman attempts to conduct litigation without the aid of a lawyer."



Plaintiff's time to appeal from the December 13, 1976 denial of her motion pursuant to Rule 60(b)(1) has expired pursuant to the provisions of Rule 4 of the Federal Rules of Appellate Procedure. Her appeal rests entirely from the denial of the motion for reargument and accordingly must be dismissed.

The underlying denial of plaintiff's claimed right to discovery of the defendants similarly fails to meet the finality test of 28 U.S.C. §1291. See for instance: Alexander v. United States, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1905), where the Supreme Court determined that it had no jurisdiction to entertain an appeal from an order directing the appellants to appear before a special examiner and answer questions put to them by counsel for the United States of America and to produce certain books, papers, records, documents, reports and contracts. The Court found that such an order lacked the finality requisite to sustain an appeal.

This Court follows the same principles. For instance, this Court refused to review a District Court decision which had directed discovery of documents claimed to be covered by the work product immunity observing:

"The rules governing the jurisdiction of the federal courts of appeals protect not only litigants, but the courts themselves."

American Express Warehousing, Ltd. v. Transamerica Insurance Company, 380 F.2d 277, 282 (2d Cir. 1967).

The denial of a request to compel discovery is not a final decision from which an appeal will lie. In Merino v. Hocke, 289 F.2d 636 (9th Cir. 1961), an appeal from an order of the United States District Court which had denied a motion seeking to compel the United States Commissioner to grant authority to take depositions of certain persons was found not to be a final decision within the meaning of 28 U.S.C. §1291. The Court found:

"Clearly, such an order, which the United States district court refused to disturb, is not a final decision. Title 28 U.S.C.A. §1291 provides for an appeal to this Court only 'from . . . final decisions of the district courts in the United States'."

Professor Moore's treatise states the general rule, applicable here, as follows:

"Orders refusing to compel testimony or the production of documents are usually routine nonappealable interlocutory orders." 3 Moore's Federal Practice, ¶110.13[2] at 110.13 - 157.

Plaintiff's complaint was dismissed for lack of jurisdiction over the persons of the defendants. Judgment was entered thereon and this Court (three times) sustained the District Court's determination. There is nothing final



about the current decision from which she appeals. Plaintiff seeks to compel the District Court to hear reargument of her motion. Were she to win this appeal, the District Court could only be directed to hear her argument. It would not affect the discretion of the District Court in denying her motion in the first instance nor would it accomplish her claimed objective of discovery of the defendants as to their alleged violation of her civil rights and constitutional rights. The facts themselves, as the case law cited herein, demonstrate that no appeal lies from the decision of the District Court.

POINT II. THE DISTRICT COURT HAS  
NO JURISDICTION OVER THE  
PERSONS OF THE DEFENDANTS

This Court has already sustained the decision of the District Court which found that it had no jurisdiction over the persons of the defendants. Plaintiff, pursuant to her motion founded on Rule 60(b)(1), contended that she had inadvertently failed to advise the District Court that her father had executed a lease within the State of New York.\* Accordingly, she asserts jurisdiction over

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\* Defendants fail to understand how the Federal Estate Tax return filed on behalf of the estate of plaintiff's father has the remotest connection to the threshold issue of jurisdiction over their persons.

the defendants (executors under her father's Last Will and Testament) pursuant to §302(a) of the New York Civil Practice Law and Rules which provides in relevant part as follows:

"(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or an executor or administrator, who in person or an agent:

4. owns, uses or possesses any real property situated within the state."

Plaintiff in her complaint complains that the defendants have violated her civil and constitutional rights. It is self-evident that such a cause of action against the defendants could not have grown out of a lease for real property executed by her father in Illinois covering property in the State of New York.

Judge Owen in his opinion of the District Court accurately stated:

"Ownership, use or possession of real property within the state is a predicate of jurisdiction only if the cause of action arises from such ownership, use or possession. Since plaintiff's cause of action does not arise from defendant's [sic] lease of the property, this fact does not affect the [prior judgment dismissing plaintiff's complaint]."

Judge Owen's decision accords with the state of



the law as summarized in 8 Weinstein-Korn-Miller, New York Civil Practice §302.16 at 3-133:

"The provision [CPLR 302(a)(4)] is confined to actions arising from the ownership, use, or possession of real property."

The District Court correctly found that it lacks jurisdiction over the persons of the defendants and accordingly its denial of plaintiff's motion under Rule 60(b)(1) was within its sound discretion.

#### CONCLUSION

The appeal should be dismissed on the grounds that this Court lacks jurisdiction over this appeal since it is not made from a final decision, or in the alternative, the decision of the District Court which denied plaintiff's motion pursuant to Rule 60(b)(1) should be affirmed. Further, it is requested that the defendants be awarded the costs of this appeal.

Respectfully submitted,

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HOWLEY  
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Of Counsel

THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

PATRICIA A. FAHEY,

Plaintiff-Appellant,

against

SHIRLEY E. FAHEY and NORMAN CODO,

Defendants-Appellees.

State of New York,  
County of New York,  
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes  
and says that he is over the age of 18 years. That on the 11th  
day of March, 1977, he served two copies of the  
Brief for Defendants-Appellees on  
Patricia A. Fahey, Appellant, pro se

~~the attorney xxx for the~~

by depositing the same, properly enclosed in a securely sealed  
post-paid wrapper, in a Branch Post Office regularly maintained  
by the Government of the United States at 90 Church Street, Borough  
of Manhattan, City of New York, directed to said ~~attorney~~ <sup>appellant</sup> at  
No. 750 Park Avenue, New York ( ) N. Y.,  
that being the address designated by ~~her~~ <sup>him</sup> for that purpose upon  
the preceding papers in this action.

*Irving Lightman*

Sworn to before me this

11th day of March, 1977.

*Courtney Brown*

COURTNEY BROWN  
Notary Public, State of New York  
No. 31-5472920  
Qualified in New York County  
Commission Expires March 30, 1978